IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1593

CHEVRON INTERNATIONAL OIL COMPANY, INC.,

Petitioner,

—v.—

FAIRMONT SHIPPING CORP. and FAIRWINDS OCEAN CARRIERS CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Chevron International Oil Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 4, 1975.

Opinions Below

The opinion of the Court of Appeals is reported in 511 F.2d 1252 and 1975 American Maritime Cases 261 and appears in the Appendix hereto. The opinion of the District Court for the Southern District of New York is reported in 371 F. Supp. 1191 and 1974 American Maritime Cases 608 and appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on February 4, 1975. A timely petition for rehearing *en banc* was denied on March 28, 1975, and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a contract to supply bunker fuel to a vessel, and to arrange and pay for tug assistance at the bunkering facility, includes an implied warranty of the workmanlike performance of the assisting tugs and, if so,

2. Whether such warranty is breached by the tugs' non-negligent performance in assisting a vessel which is navigating under her own power.

Statutory Provisions

No statutory provisions are involved in this case.

Statement of the Case

Chevron International Oil Company, Inc., petitioner herein, contracted to supply bunkers at Flushing, a port on the River Scheldt in The Netherlands, to the S/S Western Eagle, owned by respondents, Fairmont Shipping Corp. and Fairwinds Ocean Carriers Corp. The contract provided that Chevron would provide ordinary tug assistance needed in docking, which was arranged through its local sub-contractor at Flushing.

Because the river pilot was late in boarding the Western Eagle on her arrival at the River Scheldt, he did not order tugs until the vessel was already past the place where assisting tugs usually meet arriving vessels. The pilot undertook to turn the vessel around upstream, above Flushing, and she was half way around before the two tugs arrived on the scene. It was foggy, and a stiff wind and strong flood tide were setting the Western Eagle down toward the river dike. The pilot ordered the tugs to make fast at the vessel's bow and stern, but before they could do so, two downbound coasting vessels came out of the fog close at hand, and fearing collision, the tugs moved away from the ship's side. Without tug assistance, the Western Eagle was unable to hold her position against the wind and tide. After the coasters had passed, the tugs came back alongside the Western Eagle, but before they could make fast, she went aground, suffering extensive damage.

The Western Eagle's owners brought suit in admiralty against Chevron in the Southern District of New York, and after trial District Judge Lloyd F. MacMahon held that a warranty of workmanlike service by the assisting tugs was implied in the bunkering contract and that the warranty had been breached by the tugs' failure to arrive on time and to make fast in time to prevent the stranding. The tugs' performance was *not* found negligent. The Court of Appeals for the Second Circuit affirmed, in an opinion by Judge J. Joseph Smith which noted that the Court would have had difficulty in affirming a finding of negligence. Judge Walter R. Mansfield dissented from the imposition of liability without fault on one who provides tug services. Petition for rehearing *en banc* was denied without opinion.

REASONS FOR GRANTING THE WRIT

The decision below constitutes a significant departure from established maritime law with respect to responsibility for the performance of tug services and extends the concept of an implied warranty of workmanlike performance far beyond the purposes for which it was developed.

In *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1955), this Court held that a warranty of workmanlike performance was implied in a contract to perform stevedoring services, because control of the operation was surrendered to the stevedore, whose defective performance would impose liability on the shipowner. Relinquishing control to the contractor was again emphasized by this Court in *Italia Societa de Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964), as a prerequisite to implying the warranty in a contract to perform services:

> "Oregon, a specialist in stevedoring, was hired to load and unload the . . . vessels . . . Not only did the agreement between the shipowner place control of the operations on the stevedore company, but Oregon was also charged under the contract with the supervision of these operations." 376 U.S. at pp. 322-323.

(1) The Fifth Circuit has properly limited the warranty of workmanlike performance to the circumstances for which it was developed by this Court, where control of a shipboard operation is surrendered to a subcontractor.

The Court of Appeals for the Fifth Circuit has been careful to limit the implied warranty of workmanlike performance to shipboard service contracts where control is surrendered to the contractor.

"When a shipowner has turned his vessel over to a stevedoring company, however, and shipboard injuries result, it obviously seems unjust to hold the shipowner absolutely liable when he was, at the time of the accident, in no position to prevent the injuries. It is to alleviate the harshness of *Sieracki* absolute liability against shipowners in situations when the shipowner has relinquished control of his vessel and another party is better situated to prevent losses caused by shipboard injuries that *Ryan* indemnification is imposed. This, at least, is the message of Supreme Court opinions following *Ryan*. *See, e.g.*, Italia Societa, etc. v. Oregon Stevedoring Co., 376 U.S. 315, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964)." *Hobart* v. *Sohio Petroleum Co.*, 445 F.2d 435, 438 (5th Cir., 1971), cert. denied, 404 U.S. 942 (1971).

"The *Ryan* doctrine establishes a severe and harsh rule which imposes a substantial and heavy burden on the stevedore or one similarly situated . . . Because of the weight of this burden, and because of the far-reaching implications of the doctrine if applied outside its original context, we have been slow to expand the scope of the doctrine beyond the original factual circumstances in which it arose." *Central Stikstof Verkoopkanter, N.V.* v. *Walsh Stevedoring Co.*, 380 F.2d 523, 529 (5th Cir., 1967).

"Law review writers have characterized the indemnity theory announced in *Ryan* as a concept designed to meet special admiralty law problems involving shipowners and stevedores. In the words of one commentator, Ryan must be viewed in the light of 'the never-ending dispute between shipowners and their contracting stevedores as to which party ultimately is to respond in damages, assuming that the longshoreman's cause of action for personal injuries against the vessel

owner is a meritorious one." Bue, Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: I, 4 Houston L. Rev. 347, 408 (1966)." *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Company,* 420 F.2d 1103, 1109 N. 9 (5th Cir., 1970).

(2) The Second and Fourth Circuits have improperly extended the implied performance warranty to towage contracts, contrary to this Court's holding in *Stevens* v. *The White City* that a tug owner is not liable without proof of negligence.

The Courts of Appeals for the Second and Fourth Circuits have extended the doctrine of implied warranty of workmanlike performance to contracts to tow a "dead" ship (i.e., a ship not using her own power), *Tebbs* v. *Baker-Whitely Towing Company,* 407 F.2d 1055 (4th Cir., 1969), *Dunbar* v. *Henry Dubois Sons Co.,* 275 F.2d 304 (2d Cir., 1960), cert. denied, 364 U.S. 815 (1960), and to contracts to tow a "dumb" (i.e., unmanned) barge, *James McWilliams Blue Line, Inc.* v. *Esso Standard Oil Co.,* 245 F.2d 84 (2d Cir., 1957), *Todd Shipyards Corp.* v. *Moran Towing & Transportation Co.,* 247 F.2d 261 (2d Cir., 1957). At first blush such limited extension of the doctrine may seem appropriate, because control over the dead ship or dumb barge is relinquished to the towing company, analogous to surrendering control of loading operations to a stevedore. But the interpretation of the nature of the warranty, to impose upon the tug company liability without fault, runs afoul of the principle of maritime law enunciated by this Court in *Stevens* v. *The White City,* 285 U.S. 195 (1931), that in the absence of proof of negligence on the part of a tug, her owner is not liable for damage to the tow, even if it was unmanned and under the exclusive control of the tug. See Griffin, *The American Law of Collision* (1949), §179 "Tug's Liability to Tow."

Commentators have pointed out and criticized the anomaly of imposing liability without fault by implying a performance warranty in a towing contract.

> "* * * a warranty of workmanlike service is not applicable to a towage situation and, if extended by an erroneous belief in its applicability, would fly in the face of the rule in *The White City, supra;* would preclude limitation of liability under the 'personal contract' doctrine; and create confusion in the industry which has come to rely upon the principle that damage actions under towage contracts are *ex delicto* and not *ex contractu.* * * *" Parks, *The Law of Tug, Tow and Pilotage,* 13 (1971).

Parks' warning as to the loss of the tug owner's right to limitation of liability as a result of implying a performance warranty in a towing contract, was echoed by the Chairman of the Association of Average Adjusters of the United States in the Annual Address to the Association in 1970; Mr. Underwood expressed the view that the judicial creation of such an implied warranty is not only "bad law" because it departs from the long line of decisions, including *Stevens,* holding that "a tug's liability for damage lies in negligence only," but also "seriously dangerous," in that it would deprive a tug owner of the right to limitation of liability, to which it would be entitled if the claim sounded in negligence (1970 Report of the Association of Average Adjusters of the United States, p. 817).

Another commentator emphasized the point made by Judge Mansfield in his dissent below (App. p. 19a) against "invocation of the term 'warranty' as if it were some sort of magical talisman, particularly when the policy reasons

for the judicially created *Ryan*-type 'warranty of workmanlike service' are not present."

> "And so the words of *Ryan,* transposed to tug-tow situations without any apparent consideration for the relevance of the policies and history behind their inception in stevedoring or for the factual and legal differences between stevedoring and towing have the potential of very radical effects if pressed to their full logical extent or very modest effects if adopted to conform to existing law.
>
> "Placed against *Stevens'* attempt to define a legal relationship between tug and tow, the *Ryan* words must be either restricted to indemnity cases, an approach which fits the present cases but is illogical; treated as merely a rephrasing of the *Stevens'* dictum, an approach which is uncharacteristic of the radicalism of *Ryan;* or used to overrule *Stevens* in its entirety, which no court citing *Ryan* in a towing case has indicated that it thought it was doing. Alternatively, towage operations could be divided on their facts between those in which the tug and tow are partners, governed by *Stevens,* and those under the tug's sole control, governed by *Ryan,* though possibly a *Ryan* doctrine modified in its consequences to reflect the realities of tugs and towing.
>
> "Until a court critically examines what it does by generally applying *Ryan* in the substantially different context of towing, such application at best reflects fascination with words in preference to the ideas that they are meant to convey. At its indiscriminate worst, it has a potential for substantial unfairness." Davies, "Tugs, Stevedores and the Warranty of Workmanlike Performance," 44 *Indiana L. Journal,* 135, 158 (1969).

(3) The decision below further improperly extends the warranty concept to tug assistance contracts, despite the fact that the tugs are not in control of such operations, and imposes an insurer's liability contrary to established maritime law principles.

Still further basic changes in established maritime law result from implying a warranty in a contract to furnish tug assistance, such as in the present case, as distinguished from towage of a dead ship or dumb barge. Firstly, the element of control, fundamental to an implied warranty of workmanlike performance, is absent where the assisted vessel is navigating under the command of her own officers with a pilot in charge of the operation. Secondly, it has until now been unquestioned that the customary timecharter provision whereby a charterer arranges and pays for tug assistance does not impose liability for damage done by the tugs, even negligently, *The West Eldara,* 101 F.2d 45, 47 (2nd Cir. 1939), modified, 104 F.2d 670, cert. denied, 308 U.S. 607 (1939); Poor, *American Law of Charter Parties and Ocean Bills of Lading,* 26 (5th Ed. 1968), any more than in the case of a broker or agent who arranges for tug assistance, *Todd Shipyards Corp.* v. *Moran Towing & Transportation Co., supra,* 247 F.2d at pp. 647-8. To read a warranty of workmanlike performance into a contract to arrange and pay for a subcontractor's tugs to assist a vessel, as does the decision below, thus gives a wholly unanticipated effect to a standard maritime commercial arrangement. It shifts the risk of navigational error from the shipowner to a bunkers supplier (or timecharterer), making it the insurer of accidents involving tugs, when previously there was no liability even for tug negligence, and all that was intended was that the supplier (or charterer) would simply *pay for* the tug assistance to the vessel.

The decision below is thus doubly in error: by imposing liability without fault on the part of a tug, it conflicts with the rule of *Stevens* v. *The White City,* and by implying a performance warranty in a contract for tug assistance to a vessel navigating under her own power, it fails to recognize that *Ryan* and *Italia* establish that surrender of control to the contractor is a necessary element of an implied warranty of workmanlike performance. Under *Stevens* a tug owner is not liable for damage to an unmanned tow in the absence of fault on the part of its tug; *a fortiori* the decision below errs in holding that one who contracts to arrange for tug assistance to a navigating vessel is liable for damages resulting from non-negligent performance by its subcontractor's tugs.

The extension by the Second and Fourth Circuits of implied warranties into tug assistance contracts in situations wholly dissimilar to the stevedore cases in which this Court evolved the *Ryan* warranty, and in which new situations the warranty conflicts with established principles of maritime law, should be reviewed by this Court. Only this Court has the power to determine whether the basis for liability for damage caused by tugs should be changed by overruling *Stevens* or whether the warranty should be limited to its own context.

CONCLUSION

For the foregoing reasons the petition should be granted and a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the Court of Appeals—February 4, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Before:

HONORABLE J. JOSEPH SMITH
HONORABLE PAUL R. HAYS
HONORABLE WALTER R. MANSFIELD

Docket No. 73-1667

FAIRMONT SHIPPING CORP. and FAIRWINDS OCEAN CARRIERS CORP., Owners of the Steamship WESTERN EAGLE,

Plaintiffs-Appellees,

—against—

CHEVRON INTERNATIONAL OIL COMPANY, INC.,

Defendant-Appellant.

SMITH, *Circuit Judge:*

Fairmont Shipping Corp. and Fairwinds Ocean Carrier Corp. (collectively referred to as Fairmont) brought this action against Chevron International Oil Company, Inc. seeking to recover for damage suffered by their vessel, the steamship Western Eagle, when she fetched up against a dike in Flushing Roads at the port of Flushing, The Netherlands. Chevron contracted with Norland Shipping & Trading Co., Fairmont's agent, to supply bunkers (fuel oil) to the Western Eagle at Flushing. The contract stipulated that Chevron would also provide tug assistance; it did so through its sub-contractor or agent, Steenkolen Handelsvereeniging (SHV). The tugs, however, did not make fast to the Western Eagle when directed to do so by the pilot, and the vessel, unable to make headway on her own against the prevailing wind and current, drifted into the dike as a result. The United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* sitting without a jury, found that a warranty of workmanlike service was implied in the contract to provide tug assistance and that the tugs' failure to make fast constituted a breach of that warranty, and directed that a special master be appointed to ascertain damages. 371 F. Supp. 1191 (S.D.N.Y. 1974). We affirm.

I. THE FACTS

Since Chevron does not challenge on appeal the district court's finding that under the bunker supply contract

Chevron was obligated to provide tug assistance,[1] we may proceed directly to the facts as they unfolded at Flushing in the early morning hours of December 14, 1969. At 3:00 a.m. the Western Eagle entered the Scheldt River, eastbound for Buitenhaven, the harbor of Flushing, located on the river's north bank. She took on a local pilot, L. J. Pennarts, at 3:45. Pennarts met the Western Eagle approximately a mile upriver from the pilot station, the normal boarding area, because the pilot boat was late in leaving the harbor. Thus, when Pennarts came on board, the Western Eagle was almost abeam of Buitenhaven. The visibility at that time was poor, but not bad enough to prevent Pennarts from seeing the lights of the pilot station, the lights of the British Statesman (a tanker anchored nearby), and the fog lights on shore, half a mile away. A stiff wind (19-31 m.p.h.) was blowing out of the south, and a flood tide was moving upriver at 2 to 2¼ m.p.h.

As soon as Pennarts got on board, he radioed for the tugs. In the meantime, since the Western Eagle had gone past Buitenhaven, and since the normal practice was for tugs to meet ships over a mile to the west of Buitenhaven, Pennarts decided to turn the Western Eagle back downriver by swinging her to starboard, around the British Statesman, and to wait for the tugs at the normal meeting place in Flushing Roads. But the wind pushed the ship to port, and Pennarts' corrective steps brought him close to a buoy marking the south side of the channel. Rather than risk leaving the channel, Pennarts decided to abandon the attempt to turn the ship by itself; he stopped the engines, and then put them full speed astern, waiting for the tugs.

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1 In the district court, Chevron denied "the existence of any contract between it and plaintiffs, or the existence of any clause in the contract for pilotage or towage." 371 F. Supp. at 1192.

When the tugs—the Sophia and the Frederik Hendrik—arrived, the Western Eagle was thus considerably upriver from the normal meeting place. Pennarts ordered the tugs to make fast as soon as possible, the Frederik Hendrik to the port bow and the Sophia to the stern. The Frederik Hendrik took a heaving line, but before it could make fast both it and the Sophia suddenly moved out of position at the approach of a downriver coasting vessel. A few minutes later, a second downriver coaster approached, and again the tugs left the ship; this time, the Frederik Hendrik unfastened the heaving line. The Western Eagle was approximately 1800 feet from the northern shore when the coasters passed, port to port, between her and that shore.

Without the tugs, the Western Eagle was helpless against the wind and the tide. As she drifted toward the northern bank of the Scheldt, the tugs returned to her, but they were not in position to make fast. Despite Pennarts' efforts to keep her from stranding, the Western Eagle ran aground on the dike at 4:15. Later in the day, at high tide, she was refloated and towed to drydock where extensive damage was discovered.

II. The Existence of a Warranty of Workmanlike Service

The district court held that, because the tugs were in the best position to adopt measures to prevent the accident, but failed to do so and thereby caused the accident, there was a breach of Chevron's implied warranty of workmanlike service. Chevron argues that there was no such warranty in this case because a contract for tug assistance does not entail the relinquishing of control over the vessel's navigation to the tugs. It claims that control is a *sine qua non* to a warranty of workmanlike service.

The landmark case involving warranties of workmanlike service in maritime contracts is *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). *Ryan* was the culmination of a series of cases involving the interlocking relationship among shipowners, stevedoring companies and longshoremen, and must be read with that backdrop in mind.[2] In *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), longshoremen were held to be seamen insofar as that status made them persons to whom shipowners owe the duty—an absolute duty, not turning on fault—to provide a seaworthy ship.[3] And in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), it was held that, where the unseaworthy condition was the result of the combined fault of the shipowner and the stevedoring company (the longshoreman's employer), the shipowner was not entitled to contribution from the stevedore as a joint tortfeasor.[4] The rationale for the holding was that the creation of a rule for contribution among joint tortfeasors was a matter for legislative, not judicial action.

After *Sieracki* and *Halcyon*, shipowners were in an unenviable position: A longshoreman might be injured as a result of an unseaworthy condition caused wholly by the stevedore's negligence, and yet the shipowner, wholly without fault, could be held liable for the entire amount of compensatory damages. And this potential liability was made even more painful by the fact that the longshoreman would, in every case, sue the shipowner for unseaworthi-

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2 The discussion we set forth is limited to essentials. The history is recounted in detail in G. Gilmore and C. Black, *The Law of Admiralty* §§6-53–6-57, at 358-374 (1957).

3 *Compare, Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946), decided the same day as *Sieracki*, holding that longshoremen are not seamen for purposes of the Jones Act, 46 U.S.C. §688.

4 Under the particular facts in *Halcyon*, the stevedore was found to be 75% at fault, the shipowner only 25%.

ness rather than the stevedore for negligence because the latter cause of action had been abolished by the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C. § 901 *et seq.* (LHWCA).[5] The shipowner's plight was "a situation which cried out for relief," H. Baer, *Admiralty Law of the Supreme Court* §2-8, at 183 (1963), and that relief was granted in *Ryan*.[6] A longshoreman named Palazzolo was injured by a roll of pulpboard which had been improperly stowed by his employer, Ryan Stevedoring Company. He recovered damages from Pan-Atlantic Steamship Corporation, the shipowner, on an unseaworthiness claim under *Sieracki* and Pan-Atlantic, barred from seeking contribution by *Halcyon*, sought indemnity from Ryan on the contractual theory that Ryan had implicitly agreed to perform its stevedoring services in a workmanlike manner, and that this warranty entailed an agreement to indemnify Pan-Atlantic for any liability which it might incur by reason of an unseaworthy condition created by Ryan's unworkmanlike performance. The Supreme Court, after holding that Pan-Atlantic's action was not barred by the exclusivity provision of the LHWCA, agreed that there was indeed such a warranty, and that Pan-Atlantic was entitled to indemnification from Ryan on account of Ryan's breach thereof:

> The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.

350 U.S. at 133-34.

Subsequent decisions filled in the details of the nature and scope of the *Ryan* warranty. It was established that a stevedore's warranty to indemnify extends not only to its handling of cargo, as in *Ryan*, "but also to the use of equipment incidental thereto," *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567 (1958); that it runs not only to the shipowner, but to the ship as well, *Crumady* v. *The J.H. Fisser*, 358 U.S. 423 (1959), regardless of whether the stevedore was engaged directly by the shipowner, by a time charterer, *Crumady*, or by the consignee of the ship's cargo, *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960); and that it can be breached not only by negligently creating an unseaworthy condition, but by negligently bringing into play a pre-existing unseaworthy condition, *Crumady*, as well as by the non-negligent supplying of defective equipment. *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964). In *Italia*, the Court set forth the rationale for requiring indemnification in such situations—the same rationale that had prompted *Ryan*:

5 The LHWCA made employers liable without fault to compensate employees for work-connected injuries in amounts determined by schedules of benefits for various types of injuries, and it made that liability exclusive.

6 The commentators are in agreement that *Ryan* was designed to meet this specialized need of shipowners. Stover, *Longshoreman-Shipowner-Stevedore: The Circle of Liability*, 61 Mich. L.Rev. 539, 562 (1963); White, *A New Look at the Shipowner's Right-Over for Shipboard Injuries*, 12 Stan. L.Rev. 717, 730 (1960); 44 Calif. L.Rev. 800, 804 (1956); 32 Geo. Wash. L.Rev. 893, 894 (1964); 6 N.Y.L. Forum 168, 185 (1960); 66 Yale L.J. 581, 584-85 (1957).

Where the shipowner is liable to the employees of the stevedore company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations. [Citation omitted.]

. . . [W]e deal here with a suit for indemnification based upon a maritime contract . . . in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury [citation omitted], we think our decision today is in furtherance of these objectives.

376 U.S. at 324.

This court has more than once recognized that it is the shipowner's strict liability for unseaworthiness that rests at the heart of *Ryan* indemnity. *Schwartz* v. *Compagnie General Transatlantique*, 405 F.2d 270, 276 (2d Cir. 1968) ("[A]ny equitable considerations underlying the decision of courts to require indemnity by applying the implied warranty of workmanlike service are ultimately derived from a shipowner's liabilities under the seaworthiness guarantee . . "); *DiGioia* v. *United States Lines Co.*, 304 F.2d 421, 425 (2d Cir. 1962) ("The primary source of a shipowner's right to indemnity, as a practical matter, is his nondelegable duty to provide a seaworthy ship. . . .") *Accord: Liberty Mutual Insurance Co.* v. *Fruehauf Corp.*,

472 F.2d 69, 70-71 (6th Cir. 1972); *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141, 1145 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Hobart* v. *Sohio Petroleum Co.*, 445 F.2d 435, 438 (5th Cir.), *cert. denied*, 404 U.S. 942 (1971).[7] A striking example of the application of this principle may be found in *Davis* v. *Chas. Kurz & Co.*, 483 F.2d 184 (9th Cir. 1973). The shipowner's vessel was in a repair facility, and not in navigation. The general contractor for repairs (Northwest) hired a subcontractor (Pacific), one of whose employees was injured on the ship. He sued the shipowner and Northwest, and Northwest impleaded Pacific, seeking indemnity. One who contracts to perform repairs on a ship is generally considered bound by the *Ryan* warranty, *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F.2d 310 (2d Cir. 1958); here, however, the district court's findings that the vessel was a dead ship, and that the owner was therefore relieved of the duty to provide a seaworthy vessel, were not challenged on appeal. The Ninth Circuit held that *Ryan* was therefore inapplicable, because the shipowner's liability for unseaworthiness was removed from the case:

> The rationale underlying *Ryan* and the later cases is that when a shipowner owes a duty of seaworthiness to an injured party (and consequently its liability is not dependent on a finding of its fault) a corresponding duty of indemnity should devolve upon a stevedore whose failure to perform with reasonable safety caused the injury. [Citations omitted.]

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7 *Hobart* is one of a series of Fifth Circuit cases steadfastly refusing to extend *Ryan* indemnity to situations other than those involving a shipowner's liability for unseaworthiness. *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Co.*, 420 F.2d 1103, 1109 n. 9 (5th Cir. 1970); *Loffland Brothers Co.* v. *Roberts*, 386 F.2d 540, 549 (5th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968); *Centraal Stikstof Verkoopkanter, N.V.* v. *Walsh Stevedoring Co.*, 380 F.2d 523, 529 (5th Cir. 1967); *Ocean Drilling & Exploration Co.* v. *Berry Brothers Oilfield Service, Inc.*, 377 F.2d 511, 513 (5th Cir.), *cert. denied*, 389 U.S. 849 (1967).

> Northwest argues that the existence of the warranty does not depend on a corresponding existence of a duty of seaworthiness. We think that it does. The circumstance which gives rise to the implied warranty is the duty of seaworthiness owed by the party seeking indemnification.

483 F.2d at 187.

Other decisions—including that of the district court in this case, 371 F. Supp. at 1194-95—have rested *Ryan* on the elements of expertise, control, supervision and ability to prevent accidents: The shipowner, relying on the stevedore's expertise, entrusts loading operations to its supervision and control, thereby putting the stevedore in the best position to prevent accidents. The same reasoning has been applied to "dead tows," *Tebbs* v. *Baker-Whiteley Towing Co.*, 407 F.2d 1055, 1058 (4th Cir. 1969); and ship repairs, *H & H Ship Service Co.* v. *Weyerhaeuser Line*, 382 F.2d 711, 712-13 (9th Cir. 1967). While these factors are certainly important, *Italia*, *supra*, 376 U.S. at 322-23, they omit the most significant aspect: the fact that the absolute duty of seaworthiness requires shipowners, regardless of their fault, to pay for accidents caused by stevedores. It is doubtful that *Ryan* would have been necessary were it not for *Sieracki;* the pre-*Ryan* situation would not have been so inequitable had the shipowner's liability to the longshoreman turned solely on a negligence standard, rather than on the absolute seaworthiness standard imposed by *Sieracki.*[8] Therefore, we find the

8 The 1972 amendments to the LHWCA, P.L. 92-576, 33 U.S.C. § 901 *et seq.*, provide that shipowners can be held liable to longshoremen only for negligence, and not for unseaworthiness. By thus overruling *Sieracki*, the Congress intended to overrule indemnity to stevedores under *Ryan*. *Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 885 n. 6 (3d Cir. 1974); *Brock* v. *Coral Drilling, Inc.*, 477 F.2d 211, 213 n. 1 (5th Cir. 1973). This view is confirmed by the legislative history: "Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker." H.R. 92-1441 (92d Cong., 2d Sess.), quoted at 1972 U.S. Code Cong. & Ad. News 4698, 4704.

crucial elements of *Ryan* to be as follows: a shipowner,[9] relying on the expertise of another party (the contractor),[10] enters into a contract whereby the contractor agrees to perform services without supervision or control by the shipowner; the improper, unsafe or incompetent execution of such services would foreseeably render the vessel unseaworthy or bring into play a pre-existing unseaworthy condition; and the shipowner would thereby be exposed to liability regardless of fault. Where these elements are present, there will be implied in the contract an agreement by the contractor to indemnify the shipowner for any liability it might incur as a result of an unseaworthy condition caused or brought into play by the improper, unsafe or incompetent performance of the contractor.[11]

9 This includes a time charterer, *Crumady* v. *The J.H. Fisser*, 358 U.S. 423 (1959), or the consignee of the ship's cargo, *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960), or another in a similar position.

10 That *Ryan* no longer applies to stevedores and other employers covered by the LHWCA, *see* note 8, *supra*, does not necessarily mean that it is inapplicable to other contractors. *Ryan* has been held to apply to cases involving ship cleaning, *H & H Ship Service Co.* v. *Weyerhaeuser Line*, 382 F.2d 711 (9th Cir. 1967); ship painting, *Mortensen* v. *A/S Glittre*, 348 F.2d 383 (2d Cir. 1965); shipyard services, *American Export Lines* v. *Norfolk Shipbuilding & Drydock Corp.*, 336 F.2d 525 (4th Cir. 1964); towage services, *Dunbar* v. *Henry DuBois' Sons Co.*, 275 F.2d 304 (2d Cir.), *cert. denied*, 364 U.S. 815 (1960); and repair work on a ship's engines, *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F.2d 310 (2d Cir. 1958).

11 There is authority for applying *Ryan* to situations where the indemnitee's liability is predicated on some non-fault basis other than unseaworthiness. *Cameco, Inc.* v. *S.S. "American Legion,"* —— F.2d ——, slip op. 785 (2d Cir. Dec. 16, 1974) (carrier's liability to con-

A standard essentially equivalent to that articulated here was applied in *Hartnett* v. *Reiss Steamship Co.*, 421 F.2d 1011 (2d Cir.), *cert. denied*, 400 U.S. 852 (1970). That case involved the issue of whether the consignee of the cargo, which unloaded the cargo itself, could be held liable to indemnify the shipowner under *Ryan*. The consignee argued that, since it was merely accepting delivery of the cargo, it could not be held to the same standard of care applicable to a stevedore. This court rejected the argument, stating:

> We feel that the concept of stevedore should embrace anyone who by his acts can create—or avoid the creation of—those special risks which justify holding a stevedore to a warranty of super-carefulness to a ship, *whose own liability to injured workers approaches strict liability.*

421 F.2d at 1016 (emphasis added).

With this background in mind, it can be seen that the instant case is not really a *Ryan* case at all. The primary issue in *Ryan* was the indemnity problem, and the Court used the warranty of workmanlike performance as a vehicle

signee under contract of carriage); *United States* v. *Tug Manzanillo*, 310 F.2d 220 (9th Cir. 1962) (shipowner's liability to seaman for maintenance and cure); *James McWilliams Blue Line* v. *Esso Standard Oil Co.*, 245 F.2d 84 (2d Cir. 1957) (time charterer's vicarious liability to shipowner for negligence of third party to whom charterer entrusted vessel). In *Tebbs* v. *Baker-Whitely Towing Co.*, 407 F.2d 1055 (4th Cir. 1969), however, *Ryan* was held applicable in a situation where the negligent bailee of a tow sought indemnity on its warranty from the tug (which could have acted to compensate for the other party's negligence). It may be that indemnity under *Ryan* should not be available to a party whose liability is based solely on negligence. The result in *Tebbs* might be justified, however, under a theory of last clear chance. *See, Petition of Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118, 124 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967); *Petition of Kinsman Transit Co.*, 338 F.2d 708, 720 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

on which to base the stevedore's liability to indemnify the shipowner. *Ryan's* recognition of the existence of a warranty of workmanlike performance in a maritime service contract was merely incidental to its particularized holding that the shipowner in the circumstances there presented was entitled to indemnity. Thus, the factors to be considered in determining whether a contract includes a warranty of workmanlike performance are entirely separate from the factors that go into the determination of whether that warranty encompasses an obligation to indemnify. The arguments advanced by the parties here, as well as those relied on by the district court, are more properly directed to the latter issue. That, however, is not the issue in this case, which involves no indemnity problem. This case involves only the much simpler issue of whether Chevron's contract to provide tug assistance imposed on Chevron[12] an obligation to perform in a workmanlike manner. We perceive that as a simpler issue because in our view *Ryan*, by necessary implication, confirmed the applicability to maritime service contracts of the hornbook rule of contract law that one who contracts to provide services impliedly agrees to perform in a diligent and workmanlike manner. 9 S. Williston, *Contracts* §1012C, at 38-39 (3d ed. Jaeger 1967). This obligation has been implied in contracts ranging from an ordinary construction contract, *Henggeler* v. *Jindra*, 191 Neb. 317, 214 N.W. 2d 925 (1974), to a contract to install plumbing, *In re Estate of Talbott*, 184 Kan. 501, 337 P.2d 986 (1959), to a contract to tan goat skins, *William Beadenkopf Co.* v. *Henwood & Nowak, Inc.*, 14 F.2d 125 (D. Mass. 1926), and there is no reason why it should not be implied in maritime service contracts as well. Accordingly, we hold that there

12 And upon Chevron's subcontractor or agent. *Todd Shipyards Corp.* v. *Moran Towing & Transportation Co.*, 247 F.2d 626 (2d Cir. 1957).

should be implied in Chevron's contract to provide tug assistance[13] an obligation to perform in a workmanlike manner—that is, a warranty of workmanlike performance.

III. The Breach of the Warranty

The district court found that the stranding of the Western Eagle was caused by the late appearance of the tugs on the scene and by the failure of the tugs to make fast when directed to do so by Pennarts. Chevron claims that neither finding can support the holding that the warranty of workmanlike performance was breached: the former, because the tugs were under no duty to come out until called for by the pilot; the latter, because the tugs acted reasonably in order to avoid collision with the other traffic on the river. We need reach only the latter contention, however, because it does not appear that the finding of breach of warranty rested on the tugs' late arrival. The district court, relying on Pennarts' statement that "if the tugs had made fast, 'I was out of the trouble,'" 371 F. Supp. at 1196, specifically found that "[d]espite

13 More accurately, Chevron's contract was of a hybrid variety, for Chevron agreed to sell bunkers, a product, as well as to provide the accompanying services. This does not change the applicability to the service portion of the contract of the warranty of workmanlike performance, however. In cases involving warranties of fitness of goods, courts at one time based the applicability of the warranty on whether the contract was one to provide goods or services, and in cases of hybrid contracts the characterization was likely to be result-oriented. *Perlmutter* v. *Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954) (contract to provide hospital care held to be contract for services, not goods, and therefore hospital did not breach any implied warranty of fitness when it transfused hepatitis-contaminated blood into patient). The current trend, however, is to treat hybrids for what they are, applying the warranty of fitness to goods sold or provided in conjunction with services. *Newmark* v. *Gimbels, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969) (patron of beauty salon injured by solution applied while receiving permanent wave); *Hoffman* v. *Misericordia Hospital of Philadelphia*, 439 Pa. 501, 267 A.2d 867 (1970) (patient contracted illness from contaminated blood supplied by hospital).

the tugs' late arrival . . . the accident could have been avoided if the tugs had made fast to the Western Eagle and assisted her in turning." *Id.* at 1197.[14] Thus, the crucial question in determining whether the warranty was breached is whether or not the tugs were justified in leaving the Western Eagle at the approach of the down-river coasters.

The testimony in this regard is inconclusive. On the one hand, the coasters no doubt did pass in close proximity to the Western Eagle, and Pennarts did state that he was fearful of a collision. On the other hand, it seems clear that there was a distance of 1800 feet between the Western Eagle and the northern bank of the Scheldt—ample room for the coasters to pass. It is uncontradicted that the coasters did in fact pass without incident. And it also seems to have been the case that the Frederik Hendrik was close enough to the Western Eagle to take a heaving line, but unfastened it at the approach of the second coaster. As for visibility, while there were some indications that the fog was dense, Pennarts stated that he could see lights on shore—one half mile away—when he boarded the Western Eagle.

If this were a case turning on a negligence standard, we might find it more difficult.[15] But a warranty of workman-

14 The dissenting opinion states that the Sophia did in fact make fast after the coasters had passed, but the line parted. However, Schuiling, the Sophia's captain, stated that he first made fast at "exactly" 4:20 a.m. Since the Western Eagle went aground at 4:15, it would appear that, even if the Sophia did manage to make fast, she did so after the stranding, too late to be of assistance. The tow rope evidently parted because it was not strong enough to pull the Western Eagle off the dike.

15 Possibly a finding of negligence based on the abandonment of Western Eagle by the tugs under the circumstances would have been sustainable, but this is not before us.

like performance may be breached by non-negligent as well as by negligent conduct. *Italia, supra,* 376 U.S. at 324. We are not prepared to hold that the district court's finding of breach under the conditions outlined above is clearly erroneous. Accordingly, we affirm the holding that the tugs breached their warranty of workmanlike performance.

Chevron presses on us one final argument: It claims that the Western Eagle's own conduct in putting herself in a position of danger under conditions of adverse visibility, wind and current should bar Fairmont from recovery. Again, if this were a negligence case, we might have more difficulty. But negligence alone will not bar a plaintiff from recovering for breach of warranty of workmanlike performance. "Merely concurrent fault is not enough"; there must be "active 'hindrance.'" *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats.*, 346 F.2d 481, 484 (2d Cir.), *rev'd on other grounds*, 382 U.S. 283 (1965). There was no such hindrance here. Defendant's own expert testified that if, as Pennarts stated, visibility was half a mile at the time Pennarts boarded the Western Eagle, then the Western Eagle was "entitled to proceed." And even after the Western Eagle had gotten into trouble, she could have made it safely to port had the tugs not left her when Pennarts directed them to make fast. It can hardly be said that at that time the Western Eagle actively hindered the tugs from making fast. We therefore reject Chevron's contention that Fairmont should be barred from recovery by reason of the Western Eagle's own conduct.

In sum, we hold that the contract contained an implied warranty of workmanlike service, that the tugs breached the warranty, and that the Western Eagle did nothing to bar Fairmont's recovery. We therefore uphold the interlocutory order of the district court, and remand for an assessment of damages.[16]

Affirmed.

MANSFIELD, *Circuit Judge* (Dissenting):

Judge Smith's thorough and scholarly analysis of the historical development of the *Ryan*-type warranty demonstrates that we are not here confronted with such an indemnity but with an implied obligation arising out of Chevron's contract to provide tug assistance. However, I do not agree with the majority's interpretation of the nature and extent of that implied obligation. Furthermore the proof is overwhelming that there was no breach of it.

Chevron did not contract to assume control over a dead ship. See, e.g., *Tebbs* v. *Baker-Whitely Towing Co.*, 407 F.2d 1055 (4th Cir. 1969); *Todd Shipyards Corp.* v. *Moran Towing & Transportation Co.*, 247 F.2d 626 (2d Cir. 1957); *James McWilliams Blue Line, Inc.* v. *Esso Standard Oil Co.*, 245 F.2d 84 (2d Cir. 1957). It contracted merely to provide "ordinary tug assistance if required" to the Western Eagle as a live ship under its pilot's control. This is not, therefore, a case of the type referred to by the district judge where "[t]he shipowner turns his vessel over to the tug's control, depending on the latter's expertise in conducting safe towing operations." (App. 298a). Were control of the ship to be with Chevron, it might have

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16 We have decided this case on the basis of United States law. The contract was entered into in New York, but the place of performance was The Netherlands. We have not considered whether choice of law rules would require application of Dutch law because, in view of the fact that neither party has suggested that the foreign law would differ from United States law, we are not required to conduct an independent investigation of foreign law. Fed. R. Civ. P. 44.1; *Bartsch* v. *Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 n. 3 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968).

insisted upon taking greater precautions than those observed by one rendering "assistance." Indeed the tugs hired by Chevron could justifiably have refused to accept control initially unless they were given ample advance opportunity to exercise control effectively, which was not the case here since there was a dense fog and the pilot did not ask for tug assistance until the ship had gone past Buitenhaven and was in danger. Were the tugs in control, they might have demanded that the Western Eagle drop anchor until they could navigate safely; or, in the alternative, they might have decided upon a different and safer course to pursue up the Scheldt River.

But control of the Western Eagle remained with the pilot and Chevron was not required to take these precautions. It bound itself merely to provide "ordinary tug assistance." Regardless whether that obligation is labelled a contractual promise or a warranty, it did not convert Chevron into an insurer against accidents, see *Stevens* v. *The White City*, 285 U.S. 195 (1932). Nor did it relieve the shipowner of responsibility for accidents occurring while the ship was within its control, *The McCaldin Brothers*, 213 Fed. 211 (2d Cir. 1914). The contract obligated the tugs to render such assistance as could *reasonably* be expected of them under all of the circumstances that might be confronted, see *Stevens* v. *The White City*, *supra*, including the position in which the vessel might place itself prior to calling for assistance and the possibility that if the tugs should, in the course of rendering assistance, be faced with imminent peril to themselves and their crews they could not reasonably be expected to destroy themselves. Faced with imminent peril to themselves or the ship, their contractual duty to assist would not preclude their exercise of reasonable discretion in determining whether to carry out dangerous orders from the pilot, see

The Edward G. Murray, 278 Fed. 895 (2d Cir. 1922); cf. *Esso Standard Oil, S.A.* v. *S.S. Gasbras Sul*, 387 F.2d 573, 580 (2d Cir. 1967), *cert. denied*, 391 U.S. 914 (1968). Surely these time-honored principles of reasonableness in construing the term "assistance" cannot be repealed or negated by invocation of the term "warranty" as if it were some sort of magical talisman, particularly when the policy reasons for the judicially created *Ryan*-type "warranty of workmanlike service" are not present. With the shipowner in command of the ship, the need for saddling the tugs with strict liability is certainly less than where they are in control. In my view a tug obligated to render "assistance" is held to no more than a standard of reasonable care in the rendition of that assistance, whether or not the obligation is labelled contractual or given the more exacting term "warranty."

Regardless whether Chevron's obligation rose to the level of a warranty, the proof was clearly insufficient to support a finding that Chevron breached its obligation. Since the key witnesses, the pilot of the ship (Pennarts) and the captains of the two tugs (Schuiling and Bout) testified by deposition, we are in as good a position as the trial judge to assess their testimony. The record reveals that the two tugs (the Sophia and the Frederik Hendrik) proceeded from port to assist the Western Eagle as soon as they were called upon to do so. However, this may well have been too late because, as both tug captains testified, it was dark, there was a "dense fog," with "visibility . . . [that] varied from thirty to forty meters," there was a strong flood tide and a force 5 to 6 wind sweeping the ship east and northward toward the rocky dike. The Hendrik, which was the first tug to arrive near the ship, went to the port side of the bow of the Western Eagle as directed by its pilot and was unsuc-

cessful in picking up the ship's tow rope because the ship was going astern and moving away as the tug lay dead in the water. At that point, with the Hendrik under the ship's bow, the tug captain (Bout) saw the mast headlights of two coasters bearing down on his position from the eastward. The Western Eagle swung violently to the port. The Hendrik, fearing that one of the coasters would collide with it, then moved to the starboard side of the Western Eagle. The Hendrik's captain testified that "his first duty was to get himself into safety, when he saw that coaster."

In the meantime the tug Sophia arrived on the scene and, according to the testimony of her captain (Schuiling) found the ship "at a distance of about a hundred to one hundred fifty meters away from the coastline" upon which the ship was soon to strand. The captain further testified that as his tug was located about 30 meters from the stern of the Western Eagle he was instructed by its pilot to stand by so that he could make fast by tow line to the aft of the ship. At that point he observed two coasters coming down the river from the east, one on the right side of the channel and the other to the left, and "took for safety's sake a position amidships of the Western Eagle." The Western Eagle was going astern, located only a short distance from the north shore, and the first coaster passed 30 to 40 meters off its port bow toward the near shore. Immediately thereafter the second coaster also passed along the port side of the Western Eagle toward the north shore and only "a few meters" from its stern. The Sophia then picked up the Western Eagle's tow rope and made fast to the ship but the line parted. More tow ropes were then picked up and made fast but by that time the Western Eagle was aground.

Thus, according to the testimony of the two tug captains, they had little or no time to make fast to the

Western Eagle, one having been unable to pick up the tow rope near the bow and the other having been ordered by the pilot to stand by in readiness to pick up a tow rope near the stern, when they saw the two coasters bearing down on them and, apprehending a collision, moved to a safer position. As it was, the second coaster barely missed colliding with the Western Eagle.

That the tugs' apprehension of an imminent collision with the coasters was not unreasonable is attested to by the following testimony of the pilot of the Western Eagle:

> "Q. Were you concerned about a collision with the second coaster, is that the reason you stopped your vessel? A. Yes. I wanted to give her room.
>
> "Q. So that the second coaster was close enough that you were concerned about a possible collision and that is the reason you gave stop? A. Yes." (App. 63a).

The vessel's log contained the following entry:

> "To avoid collision with two other vessels seaward bound we were obliged to perform full astern and whistled three short blasts." (Ex. I; App. 113a).

Since the tugs measured 36 meters long by 8 meters in the beam it appears that, if it had remained to the port of the Western Eagle, the Hendrik would probably have been struck by one of the two coasters, which passed only a short distance away on the same side of the Western Eagle.

Notwithstanding the foregoing, the district court found:

> "Apparently, the tugs feared a collision with the coasters, which arrived on the scene as they were about to make fast. The testimony and written statements of Pennarts, however, who had the best vantage point

to judge the situation, fail to show that he believed there was any danger that the tugs and coasters would collide. Rather, there was ample room between the WESTERN EAGLE and the northern shore for the coasters to pass, as they did, without incident." (App. 306a).

The proof, including the testimony of the pilot of the Western Eagle, however, shows that everyone, including the pilot, feared a collision. Furthermore, if the Western Eagle had been located 3 cables (i.e., approximately 1,800 feet) from the north shore, rather than 100 to 150 meters as Captain Schuiling testified, the tugs would undoubtedly have had ample time after the two coasters passed to make fast and start towing the ship southward.

In view of the foregoing undisputed evidence, the district court's finding that Chevron breached its obligation to render tug assistance was clearly erroneous.

Opinion of the District Court—March 8, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3382-LFM

FAIRMONT SHIPPING CORP. and FAIRWINDS OCEAN CARRIERS CORP., Owners of the S.S. WESTERN EAGLE,

Plaintiffs,

—against—

CHEVRON INTERNATIONAL OIL COMPANY, INC.,

Defendant.

MACMAHON, *District Judge.*

In the early morning hours of December 14, 1969, the S.S. WESTERN EAGLE, a vessel of Liberian registry, stranded on a dike in Flushing Roads, a body of water leading to the port of Flushing, The Netherlands. Plaintiffs, the owners of the WESTERN EAGLE, seek to recover for the damage to the vessel, claiming that the conduct of the tugs SOPHIA and FREDERIK HENDRIK caused the grounding and that defendant is liable, in contract, for the breach by the tugs of an implied warranty of workmanlike service. The case was tried to the court, sitting without a jury, on the issue of liability only.

Plaintiff's theory of recovery is based upon an alleged contract for bunkers[1] between plaintiffs and defendant,

[1] "Bunkers" are fuel oil.

whereby defendant promised, among other things, to provide the WESTERN EAGLE with pilotage and tugs at Flushing. This contract, plaintiffs argue, contains an implied warranty of workmanlike service, which was breached by the tugs' conduct, and defendant is therefore liable for the foreseeable damages resulting from the breach. Defendant denies the existence of any contract between it and plaintiffs, or the existence of any clause in the contract for pilotage or towage, or of an implied warranty of workmanlike service, or any conduct by the tugs amounting to a breach of that warranty. We turn first to the question of the contract, if any, and its terms.

The WESTERN EAGLE, a converted T-2 tanker, was bound for the United States after discharging her cargo at Boulogne and was in need of fuel. The only bunkers available in Northern France in December 1969 were being sold at excessively high prices and, therefore, Alex Pagel, an employee of Norland Shipping & Trading Co. (Norland), which was acting as agent for the vessel's owners, attempted to acquire a more economical stem[2] for the WESTERN EAGLE at other ports in Northern Europe. Pagel called C. D. Mallory & Co., Inc. (Mallory), Norland's regular bunker broker, to discuss an economical stem. Pagel spoke to Franz P. K. Werner of Mallory, who advised him that a good bunkering port might be Flushing, Holland.

Pagel examined the bunker prices at Flushing and found them to be slightly higher than at Rotterdam, where Norland had a contract with Gulf Oil Co., so he asked Werner why the WESTERN EAGLE should bunker at Flushing if it were more expensive. Werner replied: "Ah, but there is a gimmick to this one. . . . Chevron takes care of everything

[2] A "stem" is a contract for bunkers.

there. They furnish the agents and the pilots and the tugs and so forth." Werner also pointed out that Flushing, being located further south, would involve less steaming than Rotterdam.

A few days later, Mr. Joyce and Mr. Johnson, sales representatives for Chevron, met with Pagel and:

> "[M]ade a small pitch for us using Flushing so that they would get the business rather than Gulf Oil and the tenor of their pitch was fairly consistent, that if we go to Flushing [they] take care of everything, they said, they take care of the pilots, they take care of the tugs, they take care of the agents and the only thing we would have to do is send an ETA for themselves there in Holland and they acted as agents for us. The suppliers would be some company I believe called SHV or PAM Oil."

Werner testified that he made an offer to Pagel on behalf of Chevron and that, during the negotiations with Pagel, they referred to Chevron's price list for "Marine Marketing," dated October 1, 1969 (PX 2). Werner stated that this document "is sort of our booklet we go by." On page 9 of the booklet, under the column entitled "Remarks," for Flushing appears this language:

> "Following included in the price: Pilotage, harbor dues, clearance, quay hire, mooring, unmooring and ordinary tug assistance if required, provided vessel enters Flushing for purpose of bunkering only and lifts min. 150 tons."

The agreement between Norland and Chevron was finalized on December 8, 1969 and is contained in plaintiffs' Exhibit 1, the "Bunker Confirmation." This document is a

Mallory standard form and lists WESTERN EAGLE as the vessel involved, Norland as the buyer and Chevron as the seller of 1,000 tons of bunkers. The "Readiness Date" is listed as "December 12-16, 1969." Chevron is also listed as "Vessel's Agent."

Pagel was aware that the bunkers would be supplied at Flushing by Steenkolen Handelsvereeniging (SHV),[3] a local Dutch firm, but it was always his impression that "Chevron was the person with whom we would have the contract. . . . "

There can be no doubt from the evidence that the contract contained in Exhibit 1 was between Norland, as agent for the owners of the WESTERN EAGLE, and Chevron, as seller of the bunkers. Certainly this was the contemplation of the parties, especially Pagel and Werner, who conducted most of the negotiations. Werner made his offer to Norland on behalf of Chevron, and it was always the parties' understanding that Chevron would be the contracting party. This view is amply supported by Exhibit 1, which lists Chevron as the seller, as well as by the testimony of Werner and Pagel. Chevron's claim that it acted merely as agent for SHV is not supported by the evidence. Rather, SHV acted as a subcontractor to, or supplier for, Chevron.

Moreover, the contract negotiations reveal that the parties believed the contract included a term requiring Chevron to provide tug assistance and pilotage to the WESTERN EAGLE at Flushing. Not only did Pagel and Werner rely on the Chevron price list, which spelled out the "extras" available at Flushing, but Pagel discussed the pilotage and tug provisions with Chevron's employees[4] and with Werner

[3] SHV is listed on page 4 of the price list as the supplying company at Flushing.

[4] Defendant failed to produce either of these Chevron representatives at trial to dispute Pagel's testimony.

In fact, these special provisions were the motivation for the vessel's bunkering at Flushing rather than Rotterdam. Thus, we find that a contract for bunkers existed between plaintiffs, the owners of the WESTERN EAGLE, and Chevron and that the contract required Chevron to provide the WESTERN EAGLE with pilotage and tug assistance at Flushing.

Plaintiffs contend that Chevron's promise to provide tugs contained an implied warranty of workmanlike service and that this warranty was breached by the SHV tugs' "negligent" conduct.

The doctrine of the implied warranty of workmanlike service in maritime contracts originated in the landmark case of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) (*Ryan*). There, the Supreme Court sustained a claim for indemnity against a stevedoring firm by a shipowner which had paid a substantial judgment to a longshoreman injured while unloading cargo improperly stowed by the stevedore. The Court reasoned that it was "of the essence of [the] stevedoring contract" that the stowage of cargo be performed competently and safely and likened the stevedore's warranty of workmanlike service "to a manufacturer's warranty of the soundness of its manufactured product." 350 U.S. at 133-34. The Court emphasized that the shipowner's action was in contract, not in tort.

Similar warranties have been implied in other maritime service contracts involving comparable expertise, control and supervision to that of the stevedore in *Ryan*. *Tebbs* v. *Baker-Whiteley Towing Co.*, 407 F.2d 1055, 1058 n.1 (4th Cir. 1969); *Great American Ins. Co.* v. *Bureau Veritas*, 338 F. Supp. 999, 1014 (S.D.N.Y. 1972). A contract of towage also gives rise to an implied warranty of workmanlike ser-

vice. *Dunbar* v. *Henry Dubois' Sons Co.*, 275 F.2d 304, 306-07 (2d Cir. 1960); *James McWilliams Blue Line, Inc.* v. *Esso Standard Oil Co.*, 245 F.2d 84, 87 (2d Cir. 1957); *Tebbs* v. *Baker-Whiteley Towing Co., supra,* 407 F.2d at 1058-59; *A/S Atlantica* v. *Moran Towing & Transp. Co.*, 360 F. Supp. 1225, 1227 (S.D.N.Y. 1973); *T. J. Stevenson & Co.* v. *George W. Whiteman Towing, Inc.*, 331 F. Supp. 1038, 1043 (E.D. La. 1970); *Farrell Lines, Inc.* v. *Birkenstein,* 207 F. Supp. 500, 507 (S.D.N.Y. 1962).[5] The shipowner turns his vessel over to the tug's control, depending on the latter's expertise in conducting safe towing operations.

The presence and extent of the warranty and its breach, if any, depends upon the circumstances of the particular case relating to control, supervision and expertise. *H & H Ship Service Co.* v. *Weyerhaeuser Line,* 382 F.2d 711, 713 (9th Cir. 1967); *Tebbs* v. *Baker-Whiteley Towing Co., supra,* 407 F.2d at 1059. The Supreme Court in the stevedore cases, established the rule that "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." *Italia Societa per Azione di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964) (*Italia*). Thus, the burden should be placed, ultimately, upon the party whose default caused the injury. *Reed* v. *The Yaka,* 373 U.S. 410, 414 (1963); *Italia, supra,* 376 U.S. at 324.

This brings us to the question of control. Chevron claims that the tugs were never in a position of control and that, therefore, no implied warranty of workmanlike service

[5] See also, *Singer* v. *Dorr,* 272 F. Supp. 931, 934-35 (E.D. La. 1967); *United States* v. *Tug Manzanillo,* 310 F.2d 220, 222 (9th Cir. 1962). This line of cases has been criticized in A. L. Parks, *Law of Tug, Tow and Pilotage* (1971), at 13, 500-01.

arose. This point is well taken, but this case does not turn on the narrow issue of control. Even if the tugs were not technically "in control," they may still have been the party best situated to prevent the accident, *Italia, supra,* 376 U.S. at 324, and therefore liable for breach of the warranty of workmanlike service.

We wish to emphasize that this is a case in contract, not tort, *Ryan, supra,* 350 U.S. at 134, and that non-negligent as well as negligent conduct may breach the warranty. *Italia, supra,* 376 U.S. at 315.[6] Thus, we must determine which party, if any, was in the best position to prevent the stranding of the WESTERN EAGLE and whose conduct caused the damage to the vessel. We now turn to the events of the stranding.

The WESTERN EAGLE, under the command of its master and a Belgian sea pilot, steamed into the Scheldt River, heading east for Buitenhaven, the harbor of Flushing, about 3:00 A.M. on December 14, 1969. At 3:45, L. J. Pennarts, an experienced Dutch river pilot, boarded the WESTERN EAGLE, replacing the sea pilot. At that time, the visibility was poor but sufficient to enable Pennarts to see the lights of the pilot station, the tanker BRITISH STATESMAN, which was anchored nearby, and the fog lights of Flushing, one-half mile away. The wind was from the south at a force of 5-6 on the Beaufort scale (19-31 mph). A flood tide, or "run of the tide," was moving upriver, from west to east, at 2 to 2¼ mph.

Because the pilot boat was late leaving the pilot station, Pennarts did not board until the WESTERN EAGLE was al-

[6] This disposes of Chevron's contention that misfeasance, not nonfeasance, is required to breach the warranty. *Italia* was a classic case of nonfeasance, *i.e.*, a failure to discover defective equipment. 376 U.S. at 321.

most abeam of Buitenhaven, nearly a mile upriver from the pilot station, where he had intended to board. Immediately after boarding, at 3:50 A.M., Pennarts called Flushing radio and announced his intention to take the ship into Buitenhaven. He then ordered the SHV tugs to come out and make fast to the WESTERN EAGLE. The tugs had, until this time, not proceeded out from Buitenhaven because the sea pilot had not ordered them to do so and because their captains thought the WESTERN EAGLE would anchor in Flushing Roads due to the unfavorable weather.

The presence of the anchored tanker, BRITISH STATESMAN, on the south side of the Scheldt, opposite Buitenhaven, prevented Pennarts from making a starboard turn there, thus maneuvering the WESTERN EAGLE's head into the flood current. Therefore, the pilot continued upriver past the tanker, where he attempted to turn the ship to starboard by ordering the engines full speed astern. Since the WESTERN EAGLE has a right-handed screw, this maneuver would normally turn the ship to starboard, but the wind was blowing so powerfully from the south that the ship swung to port from a heading of 90° to one of 60°. Pennarts corrected the ship's course to 95° at 3:58 A.M. by ordering a hard starboard rudder and the engines slow ahead, but this brought the vessel dangerously close to running over Buoy No. 1, located on the south side of the channel. To avoid steaming over the buoy, Pennarts, at 4:05, stopped the ship's enginess and then put them full speed astern.

By this time, the SHV tugs SOPHIA and FREDERIK HENDRIK had arrived. Pennarts ordered the tugs to make fast to the WESTERN EAGLE as soon as possible. The FREDERIK HENDRIK was to make fast to the port bow, and the SOPHIA to the stern of the ship, so that the WESTERN EAGLE

could be swung to starboard, with its bow facing south. The SOPHIA, however, instead of going to the vessel's stern, went amidships. The crew of the WESTERN EAGLE threw a heaving line to the FREDERIK HENDRIK, but this tug suddenly moved across the ship's bow to starboard. This sudden movement was caused by the approach of a coaster (a small river and coastal craft) moving down-river from Antwerp. The coaster sounded three short whistle blasts, and the WESTERN EAGLE responded with three short blasts and moved full speed astern. The coaster passed the ship on the port side, between the northern shore and the WESTERN EAGLE. At this point, the WESTERN EAGLE was about 3 to 3½ cables, or 1800 feet, from the northern shore.

A few minutes later, at 4:10, another downriver coaster approached, this time from the starboard side. Pennarts stopped the WESTERN EAGLE's engines, allowing the coaster to pass on the port side. At the approach of the second coaster, both tugs moved away from the ship, apparently fearful of a collision with the coaster. The crew of the FREDERIK HENDRIK unfastened a line connecting her aft to the WESTERN EAGLE's starboard bow, and the tug moved away.

Abandoned by the tugs, the WESTERN EAGLE was unable to combat the effect of the strong wind and the flood tide which were pushing the ship in a northeasterly direction, at a heading of 45°, towards the northern shore of the Scheldt. The SOPHIA and FREDERIK HENDRIK were now near the ship, but in the wrong position to make fast or otherwise render any assistance to her. Pennarts attempted to prevent the vessel from stranding, at 4:12, by ordering a hard starboard rudder with engines full ahead, but this maneuver was in vain and the vessel continued to drift towards the northern shore. At 4:13, Pennarts tried to soften the

impact of the imminent grounding by putting the engines full speed astern, but the vessel was unable to make any sternway, and the ship ran aground on the dike at 4:15, about two cables to the west of Schone Waardin light, on the northern shore of the Scheldt River.

The SOPHIA and FREDERIK HENDRIK were then joined by a third SHV tug, but together they were unable to pull the WESTERN EAGLE off the shore. Later that day, at high tide, the vessel was refloated by tugs furnished by a salvor pursuant to a Lloyd's salvage agreement. The WESTERN EAGLE was then towed to drydock, where it was discovered that she had suffered extensive damage.

The evidence shows that the stranding of the WESTERN EAGLE was caused by the inadequate assistance rendered to her by the SHV tugs. The tugs not only appeared late (after the ship was well east of Buitenhaven) but, after meeting the ship, failed to make fast and provide any assistance to the WESTERN EAGLE as she drifted towards the northern shore.

Pennarts, who was in the best position to observe the danger to the ship, testified that he was depending upon the tugs to make fast and aid the ship in making a starboard turn to stem the tide. He stated that if the tugs had made fast, "I was out of the trouble." He also said that if no tugs had been available, he would have sailed up the Scheldt to No. 5 buoy and turned the ship there. In his written statement (DX A), Pennarts cited the late arrival of the tugs, along with the speed of the vessel when he boarded and his late boarding of the WESTERN EAGLE, as one of the causes of the stranding.

Thus, Pennarts depended on the SHV tugs to help the WESTERN EAGLE combat the force of the southerly wind

and the flood tide, and his decision to turn the ship just after No. 1 buoy was based on his assumption that the tugs would make fast and assist the ship. The evidence shows that the WESTERN EAGLE was unable, by the force of her own engines, to make progress against the wind and the tide. Only with the aid of the tugs could the vessel have avoided grounding.

Schuiling, the captain of the SOPHIA, testified that the tugs' normal practice was to meet ships over a mile to the west of Buitenhaven. He stated that due to the flood tide, it was especially important that the tugs meet the ship before she reached the entrance to Buitenhaven because it was easier to maneuver downriver. Although Schuiling heard the sea pilot ask by radio for a river pilot and knew that the WESTERN EAGLE was bound for Buitenhaven to bunker and that she required tug assistance, he assumed that because the weather was bad the vessel would anchor in Flushing Roads. Therefore, the SOPHIA and the FREDERIK HENDRIK did not come out into the Scheldt until ordered to do so by Pennarts. The late arrival of the tugs meant that the WESTERN EAGLE moved far upriver from the safest and easiest place for the ship to maneuver and this limited the effectiveness of the tugs' assistance to the WESTERN EAGLE.

Despite the tugs' late arrival, however, we believe the accident could have been avoided if the tugs had made fast to the WESTERN EAGLE and assisted her in turning. Unfortunately, the tugs disobeyed the orders of Pennarts to make fast to the ship and thus abandoned her to the mercy of the wind and the tide. Apparently, the tugs feared a collision with the coasters, which arrived on the scene as they were about to make fast. The testimony and written statements

of Pennarts, however, who had the best vantage point to judge the situation, fail to show that he believed there was any danger that the tugs and coasters would collide. Rather, there was ample room between the WESTERN EAGLE and the northern shore for the coasters to pass, as they did, without incident. Both Captains Schuiling and Bout (captain of the FREDERIK HENDRIK), acknowledged that they had received Pennarts' order to make fast and were in position to do so when they left the ship. In fact, the crew of the FREDERIK HENDRIK unfastened a line from the WESTERN EAGLE which had been attached to the tug.

The tugs' duty to perform under the contract included the obligation to carry out, if possible, all orders given them by the pilot during the performance of their duties. *Lykes Bros. S.S. Co.* v. *The A. W. Whiteman,* 138 F. Supp. 725, 727 (E.D. La. 1956); *Rawls Bros. Contractors, Inc.* v. *United States,* 251 F. Supp. 47, 52 (M.D. Fla. 1966). This the tugs failed to do.

Moreover, the evidence shows that the tugs, and only the tugs, could have prevented the stranding. The WESTERN EAGLE was dependent on the tugs' expertise to prevent her from drifting towards the northern shore, since her engines were unable to move the ship against the force of the wind and tide. Applying the standard laid down by the Supreme Court in *Italia* and *Reed,* (1) the tugs were in the best position to adopt measures to prevent the accident, but did not, 376 U.S. at 324, and (2) the tugs caused the accident, 373 U.S. at 414, and thus failed to fulfill their warranty of workmanlike service.

Since Chevron is responsible under its contract with plaintiffs for the performance rendered by its subcontractor or agent, SHV, *Todd Shipyards Corp.* v. *Moran Towing*

& Transp. Co., 140 F. Supp. 107, 110 (E.D.N.Y. 1956), *aff'd,* 247 F.2d 626 (2d Cir. 1957), the conduct of the SHV tugs constituted a breach of Chevron's implied warranty of workmanlike service.

Chevron, however, seeks to place the blame for the accident on plaintiffs, citing as causes of the accident (1) the failure of the WESTERN EAGLE's master to anchor his ship in Flushing Roads and (2) the unseaworthiness of the WESTERN EAGLE.

Before considering any alleged "fault" of the WESTERN EAGLE's owners, we note that where a party has failed to fulfill its duty under a warranty of workmanlike service, mere concurrent fault of the shipowner will not excuse the breach of warranty. To be relieved of its breach, defendant must show that the conduct of the shipowner prevented or seriously handicapped the tugs in their attempt to perform in a workmanlike manner. *Albanese* v. *N. V. Nederl. Amerik Stoomv. Maats.,* 346 F.2d 481, 484 (2d Cir. 1965); *Misurella* v. *Isthmian Lines, Inc.,* 328 F.2d 40, 41 (2d Cir. 1964).

Defendant's expert testified that because of the dense fog conditions, the WESTERN EAGLE should have anchored in Flushing Roads. He explained that there was no traffic control at Flushing and that it was very easy for a ship to collide with the port facilities and jetties. Therefore, he said, "any ship of a size over 1000 tons will definitely come at anchor in dense fog and will not try to enter Flushing Harbor."

The problem with this theory is that the evidence does not show that dense fog conditions prevailed. Pennarts' testimony was that when he boarded he could see lights on shore, over half a mile away. Visibility on land was poor and visibility on the Scheldt deteriorated as the WESTERN

EAGLE moved upriver, but it appears that the fog was scattered, heavy in some places but very light in others. Defendant failed to produce any evidence showing that Pennarts' estimate of the visibility on the Scheldt at the time he boarded the WESTERN EAGLE was inaccurate. Tjeed, defendant's expert, testified that if the pilot could see shore lights, "so we have a visibility of half a mile, I think he is entitled to proceed." We find that dense fog conditions were not present, and, therefore, the WESTERN EAGLE need not have anchored in Flushing Roads.[7]

Defendant also claims that the WESTERN EAGLE was unseaworthy and that, therefore, plaintiffs' recovery is barred. Specifically, Chevron claims that the WESTERN EAGLE was unseaworthy because (1) her radar was not working properly and (2) the ship was improperly trimmed, being 8 feet light at the bow. We reject both allegations of unseaworthiness.

Defendant contends that the radar of the WESTERN EAGLE was cluttered and that the faulty radar, combined with the inattentiveness of the master and crew, led to the near collision of the SHV tugs with the downriver coasters and the subsequent stranding of the vessel. This theory is not supported by the evidence. Pennarts testified that he was able to read the radar and that the clutter presented no problems in maneuvering the vessel. And both the pilot and Captain Schuiling observed the coasters on their radar minutes before they arrived. Thus, the approach of the coasters came as no surprise to either the tugs or the WESTERN EAGLE, and the radar clutter played no part in the stranding.

[7] Our finding that dense fog conditions were not present similarly disposes of Chevron's contention that the WESTERN EAGLE was derelict in not sounding proper fog signals.

Chevron also contends that the WESTERN EAGLE was improperly trimmed and that this caused her to follow the wind, swinging her bow to port when her engines were full astern. Pennarts found nothing unusual about the vessel's trim, however, and defendant's expert stated that a ship might well act unpredictably, as the WESTERN EAGLE did, in a strong wind. We think it obvious that a wind of force 5-6 on the Beaufort scale would have interfered with the navigation of any vessel, whether trimmed properly or improperly. In addition, defendant has failed to show by any convincing evidence that the trim of the WESTERN EAGLE, rather than the failure of the SHV tugs to assist her, led to the stranding.

In short, defendant has utterly failed to demonstrate that the condition of the WESTERN EAGLE, or any conduct by her master or crew, hindered or prevented the tugs from performing in a workmanlike manner.

Accordingly, we find defendant is liable to plaintiffs for breach of its warranty of workmanlike service and for any foreseeable damages suffered by the WESTERN EAGLE caused by that breach. A Special Master will be appointed, pursuant to Rule 53(a), Fed.R.Civ.P., to determine damages. The parties are directed to submit an order, not inconsistent with this opinion, within ten (10) days. The foregoing constitutes this court's findings of fact and conclusions of law, as required by Rule 52(a), Fed.R.Civ.P.

So ordered.

Dated: New York, N. Y.
March 8, 1974

LLOYD F. MACMAHON
United States District Judge